SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 691

OGDEN H. HAMMOND, JR., *Petitioner,*

vs.

EDYTHE STERLING HAMMOND, *Respondent.*

REPLY BRIEF FOR PETITIONER.

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INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

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Only a few remarks need be made as to respondent's brief. These can best be made in the order of their argument.

Point One—Foreign Law. Respondent's contention that petitioner acceded in the rulings of the Municipal Court on the exclusion of his expert testimony is a direct mis-statement of the record (R. 32, 48, 54). Petitioner's answer (R. 10-15) makes explicit reference to the whole separation agreement entered into "in the city of New York" (R. 10) and pleads a general denial (R. 13—"not indebted to plaintiff") together with two affirmative defenses, breach of custody and of delivery of the furniture. On this record it is clear that petitioner as defendant sufficiently pleaded the law of New York because it is well settled that the particular rule of pleading as to foreign law invoked by respondent "does not apply where any defense may be shown under a

general denial". *1 Bancroft's Code Pleading (1926 ed.), p. 147; Berggren* v. *Johnson,* 105 Kan. 501, 185 Pac. 291.

Respondent's authorities at p. 2 of her brief do not sustain her position. The reference to 134 A. L. R. 570, at 571 seems ill-timed in view of the flat statement at the beginning of the Annotation that "The question as to the necessity of pleading foreign law is not within the scope of this discussion" (134 A. L. R. at 570). The remainder of respondent's pleading authorities deal with the pleading of a foreign statute, a question not involved here, and not with the pleading of foreign common law which is here involved.

Furthermore this objection of respondent comes too late. It was never made in any form in the Municipal Court and was never heard until briefs were filed in the Court of Appeals. That is too late under all the authorities and constitutes waiver of technical pleading defects as a matter of law. See *Cole* v. *Ralph,* 252 U. S. 286, 290 in direct point here. "The omission to plead a foreign statute may be waived" *(1 Bancroft's Code Pleading, ap. cit. supra,* at p. 147). Respondent's own authorities, *Corpus Juris* and *American Jurisprudence,* carry this rule and a full discussion of it, 49 C. J. 830 *et seq.;* 41 Am. Juris, 565. "An amendable defect or omission in a pleading is waived, unless an objection in some appropriate form is taken in time for the amendment to be made" (49 C. J. 830). Here no objection was made by respondent before, at, or after trial when the pleading amendment could easily have been made by petitioner—her objection in the appellate courts only comes too late, *Cole* v. *Ralph, supra.*

Respondent's argument (her brief, pp. 3-4) that the Municipal Court of the District of Columbia is a court of the United States has already been answered in our brief in support of the petition at pp. 18-22 thereof. Her statement (her brief, p. 3) that in *O'Donoghue* v. *United States,* 289

U. S. 516 "the issue was merely whether the Supreme Court and *this Court* are constitutional courts insofar as the justices were entitled to the protection of Article 3, Section 1, of the Constitution" is of course inaccurate because this Court in that decision was concerned not with its own status ("this Court") but only with the status of the District of Columbia courts. If the procedure in the instant case has been followed by the Municipal Court and other inferior tribunals of the District of Columbia "from time immemorial" as respondent avers (her brief, p. 4), then it is indeed time for this Court on certiorari to declare the patent illegality of their procedure.

Point Two—Misapplication of the law of New York. Here respondent contents herself by way of argument by making a *verbatim* quotation without quotation marks and with only name changes (*i.e.*, appellant and appellee to petitioner and respondent) of the opinion of the Court of Appeals (R. 113-115). The opinion of that Court has already been fully discussed by us in our petition for rehearing (see R. 122-126) and in our brief in support of the petition (pp. 23-30; Appendix, pp. 34-41). No good purpose would be served by a repetition of our argument here.

It is to be emphasized, however, that nowhere does respondent challenge the plain misapplication of the law of New York by the Court of Appeals. Respondent does not dispute that *Haskell* v. *Haskell* (Appendix to our brief in support of the petition, pp. 34-41) is exactly in point and controlling here. Yet the Court of Appeals in the instant case has reached a determination directly contrary to that of the Court of Appeals of New York in the *Haskell* case. We say that this flagrant refusal to follow the law of New York which must here be applied under rules already laid down by this Court calls for the issuance of a writ of certiorari by this Court to correct the errors of the Court of Appeals.

Point Three—Respondent's double recovery. Here respondent does not see fit to favor us with any record reference but makes instead the most sweeping mis-statements of fact without support in the record. We rest on our full discussion in our petition for rehearing in the Court of Appeals (R. 119-121; 131-136) and in our brief in support of the petition (pp. 30-33), and will not here again repeat our argument there made. The last portion of respondent's argument (her brief, pp. 6-7) is again a *verbatim* quotation without quotation marks from the opinion of the Court of Appeals (R. 114). This argument has already been fully considered by us (R. 119-121; our main brief, p. 32) and it is clear that this case is concerned with *mistake of fact*, not *mistake of law*, so far as petitioner's 1938 overpayment was concerned. See R. 54-55, 99, Item VIII.

Conclusion.

WHEREFORE, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

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